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PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 416

THE UNITED STATES, PETITIONER

vs.

WYMAN, PARTRIDGE & COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED SEPTEMBER 2, 1930
CERTIORARI GRANTED OCTOBER 20, 1930

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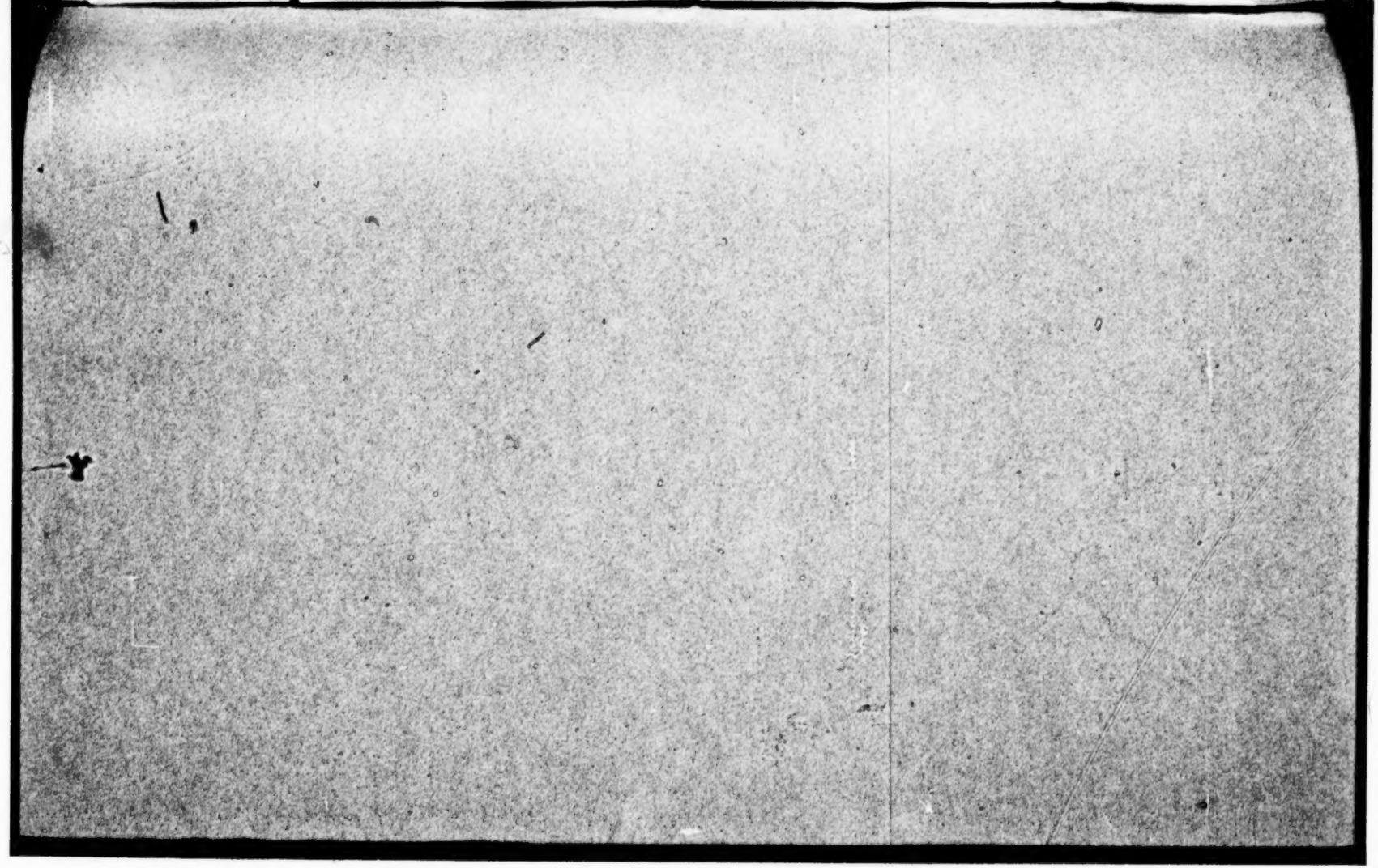

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1 In the Supreme Court of the United States

October term, 1930

No. 416

THE UNITED STATES, PETITIONER

v.

WYMAN, PARTRIDGE & COMPANY, A CORPORATION

Petition for a writ of certiorari to the United States Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the Court of Claims in the above case, rendered June 2, 1930, and not yet reported.

STATUTES INVOLVED

Section 1106 (a) of the revenue act of 1926 (c. 27, 44 Stat. 9, 113) provides:

2 "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

Sections 607, 611, and 612 of the revenue act of 1928 (c. 852, 45 Stat. 791, 874, 875) provide:

"SEC. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

"SEC. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

3 "SEC. 612. Section 1106 (a) of the revenue act of 1926 is repealed as of February 26, 1926."

STATEMENT

Respondent's income and profits tax return for the fiscal year ended November 30, 1918, was filed June 14, 1919, and the Federal tax liability reported thereon was assessed and paid during that year. (Finding 1.) On February 12, 1924, respondent and the Commissioner of Internal Revenue executed a written consent or "waiver" extending the statutory period for determination, assessment, and collection of taxes for the fiscal year in question "for one year from the date it is signed by the taxpayer." (Finding 1.)

In May, 1924, the Commissioner of Internal Revenue assessed an additional tax of $49,511.29 against respondent for the taxable period. (Finding 1.) This assessment was made within the period of limitations. On July 11, 1924, respondent filed a claim in abatement of this entire additional tax. (Finding 2.) On January 24,

4 1925, respondent and the Commissioner of Internal Revenue executed a second written consent or "waiver" further extending the statutory period for assessment of taxes for the fiscal year until December 31, 1925. (Finding 2.)

The statutory period for the collection of the taxes in question, as extended by the waivers, expired on December 31, 1925. On February 26, 1926, the revenue act of 1926 was approved.

The Commissioner of Internal Revenue by letter dated April 21, 1926, advised the respondent that its claim for abatement would be allowed to the extent of $3,518.42 and rejected for the balance, amounting to $45,992.87. (Finding 3.) On August 17, 1926, the respondent paid under protest the unabated portion of the additional tax. Interest was also paid in the amount of $545.56 on August 17, 1926, and $5,236.97 on March 5, 1927. (Finding 4.)

On July 18, 1927, the respondent filed a claim for refund of the amount so paid, upon the ground that it had been illegally collected after the expiration of the statute of limitations. This claim for refund was rejected by the Commissioner of Internal Revenue on April 4, 1928. (Finding 5.) On June 7, 1928, the

5 respondent instituted this suit in the Court of Claims to recover the additional tax so paid, with interest.

The petitioner's defense to this action was predicated upon the proposition that the provisions of section 611 of the revenue act of 1928 (p. —, supra), enacted prior to the institution of the respondent's suit, effectively barred a recovery of the amount in controversy. The respondent contended and the court held that section 611 could not be applied for the reason that the amount in suit was paid subsequent to the enactment of section 1106 (a) of the revenue act of 1926 (p. —, supra), and at a time when by reason of the provisions of section 1106 (a) respondent's liability for such additional taxes had been extinguished, and for the further reason that a denial of recovery by reason of the provisions of section 611 and of section 612 of the revenue act of 1928 (pp. ——, supra), would deprive the

respondent of a " vested right " in violation of the due-process clause of the fifth amendment.

The Court of Claims gave judgment for the respondent for $45,197.74, with interest.

6 QUESTIONS PRESENTED

1. Whether sections 607, 611, and 612 of the revenue act of 1928 should be construed to prevent the maintenance of this action against the United States.

2. Whether these sections, if so construed, are constitutional.

ASSIGNMENT OF ERRORS

1. The court erred in ruling that section 1106 (a) of the revenue act of 1926 was not retroactively repealed by section 612 of the revenue act of 1928, thereby in effect holding section 612 of the revenue act of 1928 unconstitutional.

2. The court erred in construing the provisions of section 1106 (a) to have created a " vested right " in respondent as against the United States.

3. The court erred in ruling that the provisions of sections 607 and 611 of the revenue act of 1928 did not preclude a refund or recovery of the amount in suit.

4. The court erred in refusing to recognize the power of Congress to specify the conditions under which a recovery may be had from the United States of moneys paid to or collected by it as taxes.

7 5. The court erred in giving judgment for the respondent.

REASONS FOR GRANTING THE WRIT

1. The construction and application of section 611 of the revenue act of 1928 is already before this court in four cases in which certiorari has been granted on petitions of taxpayers which the Government did not oppose—Graham v. Goodcell, No. 36, October term, 1930; Magee v. United States, No. 65, October term, 1930; Oak Worsted Mills v. United States, No. 104, October term, 1930; Taft Woolen Co. v. United States, No. 105, October term, 1930. The facts in the instant case are similar to those in the above-mentioned cases, except that in the instant case the tax was paid after the enactment of section 1106 (a) of the revenue act of 1926, while in the other cases the tax was paid before the enactment of that section.

2. Petitions for writs of certiorari are to be filed within a short time in three cases involving the same or similar points. These cases are Heiner v. Erie Coal & Coke Co., decided against the Government July 9, 1930, by the Circuit Court of Appeals for the Third Circuit, and Roy & Titcomb v. United States, decided April

8 7, 1930, and Mascot Oil Co. v. United States, decided June 2, 1930, both decided by the Court of Claims in favor of the Government upon other points.

3. The court below decided an important question of constitutional law in holding that section 1106 (a) of the revenue act of 1926 created "vested rights" which could not be impaired by subsequent legislation. The court in substance held unconstitutional section 612 of the revenue act of 1928, which in plain language repealed section 1106 (a) as of the date it was enacted. A final decision of this question of constitutional law is of great importance in securing the orderly administration of the taxing statutes. The question is presented in the cases of many taxpayers now pending, involving substantial sums of money. The precise question has been passed upon by the Circuit Court of Appeals for the Third Circuit in Heiner v. Erie Coal & Coke Co., supra, and by the Supreme Court of Pennsylvania in Wettengel v. Robinson, decided May 14, 1930. These decisions are in accord with that of the court below. But the decision of the court below is inconsistent with the reasoning of the opinion of the Circuit Court of Appeals for the Second Circuit in Reeves v. Anderson, decided July 21, 1930, and not yet reported, and with the reasoning of the Circuit Court of Appeals for the Ninth Circuit in Huntley v. Gile (32 F. (2d) 857), in both of which, however, the tax was paid before the enactment of the revenue act of 1926.

9 In United States v. John Barth Co. (279 U. S. 370, 376, this court found it unnecessary to pass on the question now presented. And in Home Insurance Co. v. Dick (281 U. S. 397, 409) this court said:

"Whether a distinction is to be drawn between statutes of limitation which extinguish or limit the right and those which merely bar the remedy, we need not now determine. Compare Davis v. Mills (194 U. S. 451) and Texas Portland Cement Co. v. McCord (233 U. S. 157) with Canadian Pac. Ry. Co. v. Johnston (61 Fed. 738)."

That issue is now raised in the instant case.

4. The decision of the court below that Congress could not by sections 611 and 612 of the revenue act of 1928 revive a tax liability which had been barred by statute is, we submit, inconsistent with the decisions of this court in Rafferty v. Smith, Bell & Co. (257 U. S. 226), United States v. Heinzsen & Co. (206 U. S. 370), and Campbell v. Holt (115 U. S. 620).

5. The court below misapplied the principle laid down in Wm. Danzer Co. v. Gulf R. R. (268 U. S. 633), for, as stated in the concurring opinion in the instant case, that case was a suit between private parties involving only the rights of private persons. The distinction between that and the instant case is obvious and the application wholly different when, as here, a public law is involved. (See Newton v. Commissioners, 100 U. S. 548, 559.)

10 6. Respondent's right to recover the taxes in controversy is purely statutory. Its suit was instituted subsequent to the enactment of the revenue act of 1928, and even if respondent had been entitled to a recovery prior to the enactment of this act by

reason of a favorable construction of section 1106 (a) of the preceding revenue act, nevertheless the enactment of sections 607, 611, and 612 of the revenue act of 1928 was a proper withdrawal by the United States of its consent to be sued and a prohibition against the entry of judgment herein. The decision of the court below that this suit could be maintained notwithstanding the action of Congress in withdrawing the consent of the United States to be sued is in conflict with the decision in Collector v. Hubbard (12 Wall. 1, 14). There this court said:

"Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer can not have any vested right in the remedy granted by Congress for the correction of an error in taxation."

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

SEPTEMBER, 1930.

11 In the United States Court of Claims

No. J–352

WYMAN, PARTRIDGE & COMPANY, A CORPORATION

vs.

THE UNITED STATES OF AMERICA

I. *Petition*

Filed June 7, 1928

To the Court of Claims of the United States and to the Honorable the Judges Thereof:

The above-named claimant by this, its petition, respectfully shows:

1. The claimant at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of Minnesota, engaged in the wholesale dry-goods business and having its principal place of business at Minneapolis, Minnesota.

2. Claimant duly prepared and executed an income-tax return for the fiscal year ended November 30, 1918, in accordance with the law then in effect and filed said return with the collector of internal revenue at St. Paul, Minnesota, on June 15, 1919. The said return was not a false or fraudulent return within the meaning of the statutes, which provide for the suspension of the running of the

statute of limitations with respect to such false or fraudulent returns.

3. Claimant on various dates paid to the said collector of
12 internal revenue at St. Paul, Minnesota, the full amount of tax shown by its return for the fiscal year ended November 30, 1918, to be due.

4. The five-year period provided by law for the assessment and collection of taxes from claimant for the fiscal year ended November 30, 1918, expired on June 15, 1924.

5. Prior to February 15, 1924, an agreement in writing was entered into between claimant and the Commissioner of Internal Revenue extending to February 12, 1925, the period within which the said commissioner might assess and collect taxes for the fiscal year ended November 30, 1918.

6. On January 24, 1925, the claimant and the Commissioner of Internal Revenue entered into a further agreement extending for one year the period within which the said commissioner might assess taxes for the fiscal year ended November 30, 1918. The said agreement of January 24, 1925, did not contain any extension with respect to the period within which the commissioner could collect taxes for the fiscal year ended November 30, 1918.

7. In May, 1924, the Commissioner of Internal Revenue assessed an additional tax against claimant for the fiscal year ended November 30, 1918, in the amount of $45,197.74.

8. In 1926 the collector of internal revenue forwarded to claimant a notice and demand, as in such cases provided for, which said notice and demand in effect informed claimant that unless said additional assessment of $45,197.74 for the fiscal year ended November 30, 1918, was paid to the said collector within a stipulated time, certain penalties would be incurred by claimant.

9. On August 6, 1926, the claimant under threat by the collector of internal revenue to impose the penalties provided for in the
13 said notice and demand, and in the belief that such penalties would be imposed by the said collector unless payment was made, did pay to the collector the said sum of $45,197.74 representing the additional taxes for the fiscal year ended November 30, 1918. The said payment was not made voluntarily by claimant but only as a result of the threat of the collector to impose the penalties provided for in the said notice and demand unless such payment was made.

10. The said collection of the $45,197.74 was illegal and void for the reason that it was made after the statutory period for collection had expired and under the threat of the collector to impose penalties which the taxpayer believed would have been imposed unless payment was made.

11. Upon information and belief the claimant avers that the total sum of $45,197.74 so paid by it to the said collector of internal revenue at St. Paul, Minnesota, was thereafter by him turned over and deposited in the Treasury of the United States of America in the usual course of his official business.

12. In July, 1927, to wit, July 14, 1927, pursuant to the provisions of law in such cases provided, claimant duly filed with the collector of internal revenue at St. Paul, Minnesota, a claim for refund of the $45,197.74 for the fiscal year ended November 30, 1918. The Commissioner of Internal Revenue has rejected the said claim for refund.

13. The whole of said sum of $45,197.74 is now wrongfully and unlawfully retained and withheld from the claimant without its consent and against its will by the United States of America.

14. No action other than as aforesaid has been had on this claim in Congress or by any department. The claimant has at all times borne true allegiance to the Government of the United States.
14 It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. It is, and always has been, the sole and absolute owner of the claim here presented. It has made no transfer or assignment of said claim or of any part thereof or of any interest therein. It is justly entitled to the amount claimed from the United States of America after allowing all just credits and set-offs.

15. The claimant believes the facts as hereinabove stated to be true.

Wherefore claimant prays judgment against the United States of America upon the facts and law for $45,197.74, together with interest and its reasonable costs and disbursements herein.

WYMAN, PARTRIDGE & COMPANY,
Claimant.

By GEO. H. PARTRIDGE.

FRANK J. ALBUS,
Attorney for Claimant,
1166 National Press Bldg., Washington, D. C.

[*Duly sworn to by Geo. H. Partridge: jurat omitted in printing.*]

15 II. *General traverse*

Filed July 17, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

III. *Argument and submission*

On April 9, 1930, this case was argued and submitted on merits by Mr. Frank J. Albus, for the plaintiff, and by Mr. Charles R. Pollard, for the defendant.

16 IV. *Special findings of fact, conclusion of law, opinion of the court by Green, J., and concurring opinion by Littleton, J.*

Filed June 2, 1930

Mr. Frank J. Albus for plaintiff.

Mr. Charles R. Pollard, with whom was Mr. Assistant Attorney General Charles B. Rugg, for defendant. Mr. J. H. Pigg was on the brief.

This case having been heard by the Court of Claims, the court, pursuant to the stipulation of the parties, makes the following

Special findings of fact

1. Plaintiff is a corporation, and on June 14, 1919, duly filed its corporation income and profits tax return for the fiscal year ended November 30, 1918, showing a tax liability of $363,641.97, which tax was paid during the same year. On February 12, 1924, the plaintiff and the Commissioner of Internal Revenue executed a waiver extending the statutory period for determination, assessment, and collection of taxes for the fiscal year ended November 30, 1918, "for one year from the date it is signed by the taxpayer." In May, 1924, the commissioner assessed against plaintiff an additional tax of $49,511.29 for the fiscal year ended November 30, 1918.

2. In order to avoid immediate payment of the additional tax assessed, and for the purpose of obtaining further consideration by the commissioner of the matter of its tax liability for the fiscal year in question, the plaintiff, on June 11, 1924, filed a claim in abatement of the said tax of $49,511.29 on several grounds. On January 24, 1925, the plaintiff and the commissioner executed a second waiver further extending the statutory period for assessment of taxes for the fiscal year in question until December 31, 1925.

3. By a letter dated April 21, 1926, the commissioner advised plaintiff that its claim in abatement would be allowed to the extent of $3,518.42, and rejected in the amount of $45,992.87. The said letter also advised plaintiff of its right to file a petition with the United States Board of Tax Appeals for a redetermination of the proposed action by the commissioner, but the plaintiff elected not to file such a petition with that board.

17 4. On August 17, 1926, the plaintiff, under protest, paid the unabated portion of the additional tax, $44,652.74 thereof being paid in cash, and the balance of $1,340.13 by the credit of an overpayment for a later year. Interest was also paid in the amount of $545.56 on August 17, 1926, and $5,236.97 on March 5, 1927.

5. On July 18, 1927, the plaintiff filed its claim for refund for the fiscal year ended November 30, 1918, in the amount of $45,197.74, "or such other amount as is legally refundable," on the ground that the same had been illegally collected after the statute of limitations had expired. This claim for refund was rejected by the commissioner on April 4, 1928.

Conclusion of law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $45,197.74, with interest as provided by law.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of forty-five thousand one hundred ninety-seven dollars and seventy-four cents ($45,197.74), with interest at the rate of six per cent per annum from August 17, 1926, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of May, 1928.

Opinion

GREEN, Judge, delivered the opinion of the court:

Additional income and excess-profits taxes were assessed against the plaintiff for the fiscal year of 1918 and collected together with interest thereon after the period of limitations had expired. Plaintiff now brings this suit to recover the amount so paid.

The plaintiff relies on section 1106 (a) of the revenue act of 1926, the provisions of which will hereinafter be set out. The defendant cites the cases of Oak Worsted Mills v. United States (68 C. Cls. 539) and Gotham Can Co. v. United States (68 C. Cls. 749) as authorities in its favor and claims that under the rules laid down therein it is entitled to judgment. Counsel for plaintiff insists that the decisions in these cases are erroneous. We do not agree with either of these contentions for reasons that follow.

The instant case is similar to the two cases cited above in some respects. There was an additional tax assessed within the period of limitations as fixed by the second waiver, a plea in abatement filed by the taxpayer, proceedings were stayed until the plea in abatement could be considered, and upon consideration the tax was in part abated and in part confirmed after the statute of limitations had run. Thereafter demand was made for the payment of the unabated portion, which the plaintiff paid under protest with interest thereon, and shortly after filed a claim for refund of the amount so paid.

There is, however, an important difference in the facts in the instant case which renders it necessary for us to review the
18 decisions in the Oak Worsted Mills case, supra, and the Gotham Can case, supra, and see whether or not they are in fact controlling. The payment of the tax in controversy was made August 17, 1926, after the passage of the 1926 revenue act and while it was still in force. This presents a different situation than that shown by the facts in the Oak Worsted Mills case and the Gotham Can case, for in both the tax was collected prior to the passage of the revenue act of 1926. In Mascot Oil Co. v. United States, No. K-67, decided February 17, 1930, a case in which the taxes were col-

lected after the expiration of the period of limitations and after the passage of the 1926 act, we called attention to the fact that the Gotham Can case was not controlling, but did not pass on the effect of section 1106 (a) of the 1926 act by reason of other facts in the case which we deemed did not make such a decision necessary. The opinion in the Mascot Oil Co. case, supra, has been withdrawn and a new opinion this day rendered upon the amended findings in order that a matter not discussed in the original opinion might be given attention, but the second opinion uses the same language with reference to the point above referred to and the judgment is the same as before.

In the Oak Worsted Mills case the question of the effect of section 1106 (a) of the act of 1926 was not presented in argument or discussed in the opinion. It is true that it was contended therein that the plaintiff had a vested right in the money which it sought to have refunded, but it was argued that this right accrued by reason of the limitation placed upon the time within which it could be collected, and we held that no vested right accrued to the taxpayer by reason of the running of the period of limitations for the collection of a valid tax. The chief contention made by counsel for plaintiff in the instant case is that plaintiff has obtained a vested right, but the claim now is that this right was obtained through section 1106 (a), to which reference has been made above.

In the Gotham Can decision we had occasion to discuss the application of section 1106 (a) to the facts in that particular case, which, however, as we have before noted, were different from those of the case at bar. In the opinion in the Gotham Can case we quoted from section 1106 (a) of the act of 1926 the following:

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability: * * *."

It is contended now, as it was in the case last cited, that this provision created a vested right in plaintiff of which it could not be deprived without due process of law and without just compensation. In the Gotham Can case we called attention to the fact that this provision was separated only by a semicolon from a qualifying clause reading as follows:

"but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

This, we said, was a qualifying clause which must be construed together and in connection with the clause first quoted and we further stated—

"By the first clause it was intended to extinguish the liability and prevent collection of any tax barred by the statute of limitations, but under the second clause of the section it was made clear
19 that if the tax had been collected after the limitation period but prior to the passage of the revenue act of 1926, only the amount collected in excess of the correct tax for the year could be

recovered. If it is not so construed, the words of the second clause are obviously of no use whatever in any case."

And we further pointed out that it was our duty in construing the act to give these words some meaning if it could consistently be done. While some other language is used in the opinion, which standing by itself might be considered to have general application, it was intended that it should apply only to the particular facts in that case, and we think it is apparent that the chief point involved in the case at bar was not involved in the Gotham Can case. This will become more evident when we consider the difference which is made when we apply the statute to the facts in the instant case as distinguished from those in the two cases cited.

In the Oak Worsted Mills case and the Gotham Can case, the tax, being collected before the enactment of section 1106 (a) of the act of 1926, was still a liability of the taxpayer although the statute of limitations had run against the remedy provided for its collection. The payment of the tax having been made upon this liability and before it was extinguished, the taxpayer had not "overpaid the tax" and in such cases section 1106 (a) provided that "no credit or refund * * * shall be allowed." But in the instant case, by force of the same statute, the liability had been entirely extinguished when the payment was collected. Necessarily "the taxpayer has (had) overpaid the tax" for there was no tax owing at the time and no liability existed when the money was collected. The collector or commissioner, therefore, took money which was not owing to the United States and for that reason could not belong to it after it had been received. After it had been paid it was still the rightful property of the taxpayer. It is plain, therefore, that the question of whether a vested right had been acquired is quite different from what it was in the Gotham Can case, nor does it depend upon the statute of limitations as it did in the Oak Worsted Mills case. The statute, when applied to the facts in the instant case, did not merely put a limitation on the collection of the tax but it completely extinguished the liability, and this was done before the tax was collected. Under such circumstances we think the plaintiff obtained a vested right which could not be taken away by the subsequent repeal of section 1106 (a) as of the day upon which it was enacted.

Although the decisions in the Oak Worsted Mills case and the Gotham Can case are only applicable to cases where the taxes were collected after the expiration of the period of limitations but before the enactment of section 1106 (a) of the 1926 act, it has become necessary to review them at length. Unless our construction of section 1106 (a), as applied to cases where the taxes were paid after the enactment of this statute fits logically and harmoniously with the construction we have heretofore given it, obviously it can not stand.

Keeping this in mind, some further considerations supporting the rules laid down in the cases cited and in the case at bar can be added to support the statutory construction which has been given to section

1106 (a), and we find there is an important matter which seems hitherto to have been overlooked. While the existence of con-
20 ditions precedent are necessary in order that section 1106 (a) may become applicable and these conditions are stated therein, section 1106 (a) is not by its terms retroactive and, in the very nature of the subject matter to which it is applicable, it can not be. Where prior to the passage of the 1926 act the payment had been made of a tax which was a liability although the remedy had been barred the money so paid became the property of the United States; the transaction was closed; there remained neither debtor nor creditor. In such cases the liability for the tax was extinguished before the enactment of section 1106 (a) by the collection thereof. Manifestly, the provision of section 1106 (a) with reference to extinguishing the liability of the taxpayer did not and could not apply to cases in which no liability existed by reason of the whole matter being settled and closed. Section 1106 (a) therefore does not change the situation of th taxpayer as to taxes collected before its enactment. Congress, of course, might have given the taxpayer the right to recover any taxes which he had paid after the period of limitations had expired for the collection of the tax, for Congress can create a claim against the United States where none exists under the law as it stands; but in order to do this a very different provision from section 1106 (a) would have been required directly authorizing the person paying the tax, or from whom the tax had been collected, to sue the Government and recover back the amount paid. But this was not done, and we think it is quite manifest that Congress not only did not make the statute retroactive but had no intention of so doing.

It has been suggested that the construction which we have given to section 1106 (a) deprives this section of any force whatever, because the taxpayer could always recover any overpayment, providing, of course, that he duly filed a claim for refund. The statement that we have made above shows the error of such a conclusion, for we apply section 1106 (a) to cases that arose after it was enacted. In the Gotham Can case the tax was collected before the passage of section 1106 (a) and we applied the second clause of that section as preventing suits to recover taxes collected before its enactment. This situation distinguishes the Gotham Can case from the case at bar.

While some have criticized the language of this section as not being clear, we think its meaning and purpose are plain. It was intended as a statute of repose. It had no application to what had been done prior to its enactment, but it warned the public officials that after it was enacted the exaction of a payment upon a tax as to which the statute of limitations had run was taking money from the taxpayer without any liability on its part existing, or, in short, a collection made where there was no debt. This construction appears to us to be a reasonable one from every point of view. There was no intention of making the statute retroactive and thus upsetting what had already been done, but it was intended that further collection of taxes

after the period of limitations had run should stop. This would prevent further litigation and come nearer doing abstract justice than any other line of procedure that could have been provided.

Section 1106 (a) of the 1926 act was repealed as of the date of its enactment by the 1928 revenue act, but the rights of the plaintiff having become vested they were not affected by this repeal.

21 See William Danzer Co. v. Gulf R. R. (268 U. S. 633, 637), and the contention of the plaintiff on this point must be sustained.

One other question remains to be decided. Section 607 of the revenue act of 1928 provided that a tax paid after the expiration of the period of limitations should be considered an overpayment, and section 611 of the same act qualified section 607 by providing that where a tax was assessed within the period of limitations, a plea in abatement filed and collection stayed, the payment of the tax before or within one year after the act went into force "shall not be considered as an overpayment under the provisions of section 607."

As before stated, we held in the Oak Worsted Mills case and the Gotham Can case that where the tax had been assessed within the period provided by the statute, a plea in abatement filed and the collection of the tax stayed, section 611 applied and there could be no recovery of the tax paid unless it was an actual overpayment. But these decisions applied only to cases where the tax had been collected prior to the enactment of the 1926 statute. In a case like the one at bar, where the rights of the plaintiff had vested before the enactment of the 1928 act, the enactment of section 611 of that act had no more effect on plaintiff's rights than the repeal of section 1106 (a) of the 1926 act.

In accordance with these conclusions judgment will be entered in favor of the plaintiff for the amount prayed in its petition, to wit, $45,197.74, with interest at the rate of six per cent per annum from August 17, 1926, until paid. It is so ordered.

WILLIAMS, Judge, and BOOTH, Chief Justice, concur.

Concurring opinion

LITTLETON, Judge, concurring: I concur in the result reached in the majority opinion, and I agree that section 1106 (a) of the revenue act of 1926 is not retroactive.

The officials of the Treasury Department collected the amount which plaintiff seeks to recover, as a tax imposed by the revenue act of 1918 for the fiscal year ended November 30, 1918, and as interest.

The defendant now insists that the retroactive repeal of section 1106 (a) of the revenue act of 1926 by section 612 of the revenue act of 1928 and the enactment of section 611 of the latter act revived the tax originally imposed by the 1918 act. It is not controverted that the amount collected, other than the interest, which was assessed in May, 1920, was then due as a tax imposed by the revenue act of 1918.

The plaintiff insists that section 611 of the revenue act of 1928 can not bar the recovery of the amount paid for the reason that this section is unconstitutional and void, in that it deprives it of a vested right which could not be taken away by subsequent legislation of Congress. The assessment in May, 1924, was a jeopardy assessment made without compliance with the provisions of law entitling the taxpayer to a hearing. This entitled plaintiff to file a claim for abatement, which was done, and no bond was required by the collector. The statutory period of limitation within which a tax for the fiscal year 1918 could be collected from plaintiff expired under the statute and the consents entered into between the plaintiff and the commissioner on December 31, 1925, at which time the tax had not been collected, and the Commissioner of Internal Revenue
22 had made no decision of the claim for abatement. The commissioner rendered his decision on April 21, 1926. Collection was not made until August 17, 1926.

By the provisions of section 1106 (a) of the 1926 act, which became effective February 26, 1926, the plaintiff's liability for the tax was extinguished, and there was, therefore, no authority in law after December 31, 1925, for the collection of any amount from the plaintiff as a tax for the fiscal year ended November 30, 1918. The evident purpose of the retroactive repeal of 1106 (a) of the 1926 act and the enactment of sections 607 and 611 of the 1928 act was to restore the system for the assessment and collection of taxes to what it was on February 26, 1926, when section 1106 (a) of the revenue act of 1926 extinguished the liability for any tax which was barred and had not been collected prior to that date and for a tax which should thereafter become barred, and provided for the refund only of the excess over the correct tax liability in respect of a tax which had been collected after the statutory period of limitation bar before the passage of that act, with the added provision contained in section 611 (act of 1928) which was retroactive, authorizing the retention by the Government of a tax collected after the expiration of the statutory period of limitation for collection, if the amount so collected was assessed prior to June 2, 1924, and within the period of limitation provided by law, if the collection was stayed beyond the period of limitation by the filing of a claim in abatement.

I am of opinion, however, that none of the provisions of the revenue act of 1928 accomplished the result of reviving the liability in respect of a tax which became barred between February 26, 1926, and May 28, 1928, even if it be assumed that Congress had constitutional authority under its broad powers to lay and collect taxes, retroactively to recreate a liability for a tax which had been imposed by prior revenue acts and which tax became barred between these dates and the liability for which had been extinguished by section 1106 (a) of the 1926 act. Taxes are not imposed by implication and we may not hold that a liability for a tax once imposed, but extinguished, is revived or reimposed by a retroactive repeal of the statute which extinguished the liability. Prior to the enactment of section 12 of the Revised Statutes, now section 28, U. S. Code, Title 1, the

repeal of an act which repealed a former act operated to revive such former act. (United States v. Philbrick, 120 U. S. 54.) And, while the provisions of section 1106 (a) extinguishing the liability for a tax barred by the statute of limitation was not an act expressly repealing the revenue act of 1918, in effect a tax imposed by the act of 1918 and barred by the statute of limitation was abrogated and annulled by the new and substantive provision of this section as completely as if express words repealing the imposition of such tax had been used, and no language can be found in any of the provisions of the revenue act of 1928 reimposing the tax or recreating the liability therefor which had been extinguished by section 1106 (a) of the 1926 act. Section 612 of the revenue act of 1928 retroactively repealing section 1106 (a) of the 1926 act can not be construed as reviving the liability for the tax imposed by the revenue act of 1918. Nor can section 611 of the 1928 act be of any help to the defendant in this regard for it only authorizes the Government to retain the amount of any tax assessed and paid after the statute of limi-
23 tation, or assessed before and paid after the limitation period.

At the time the amount here in question was collected from the plaintiff there was no tax in existence which could have been stayed by the abatement claim. It seems to me, therefore, that the provisions of section 611 can only be applied to those cases where the tax was collected after the expiration of the statute of limitation but prior to the enactment of the revenue act of 1926, and the collection of tax as to which the statute of limitation expired before collection on a date subsequent to the enactment of the revenue act of 1928. So far as concerns the taxpayer's right to recover the amount of a tax collected after the expiration of the statute of limitation, the first clause of section 1106 (a) of the 1926 act extinguishing the liability gave the taxpayer no greater right than what he had before because, if he were compelled to pay a tax that was barred by limitation, he could recover it. (Bowers v. New York & Albany Lighterage Co., 273 U. S. 346.) But, as substantive law, the provisions of section 1106 (a) extinguishing the liability had a different and greater effect upon the right of the Government to retain an amount collected while there was no liability for it as a result of the repeal of the statute which extinguished the liability of the taxpayer. (Dobbins v. Commissioner of Internal Revenue, 31 Fed. (2d) 935; Erie Coal & Coke Co. v. Heiner, 33 Fed. (2d) 135; A. T. Wettengel v. Robinson, et al., Trustees, decided by the Supreme Court of Pennsylvania May 12, 1930, Para. 1084, P. H. Fed. Tax Service, 1930, Vol. 1.)

I am of opinion, therefore, that plaintiff is entitled to recover because its liability for any amount was extinguished before the amount in question was collected, and such liability has not been revived.

I do not deem it necessary to pass upon the constitutionality of the provisions of the 1928 act. I am not prepared to agree that the extinguishment of a liability for a tax, which is a debt due the sovereign, creates such a vested or property right as was beyond

the control of Congress. The obligation to pay taxes rests not upon the privileges enjoyed or the protection given to a citizen but upon necessity of money for the support of the Government, but the citizen receives compensation therefore in privileges and protection. A tax is a demand of sovereignty. In Loan Association v. Topeka (20 Wall. 663) the court said:

"Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is, in its very nature, unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of Government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should, in some instances, be at the disposal of the Government. The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people."

There are many considerations which would enter into the question of the authority of Congress to recreate a liability to the Government for a tax that has been extinguished. A tax that is due is a debt due the sovereign and the ordinary statute of limitation relates only to the remedy and the repeal of the limitation provision,
24 even after the debt has become barred, does not deprive the citizen of his property without due process of law in violation of the fifth amendment. (Campbell v. Holt, 115 U. S. 620; Wm. Danzer & Co., Inc., v. Gulf & Ship Island R. R. Co., 268 U. S. 633.) Is the situation any different where a citizen is indebted to the Government for a valid tax, the liability for payment of which he is relieved, and shortly thereafter Congress decides to recreate the liability and remove the bar of the statute? The sovereign is not bound by the statute of limitation except by its consent, and in respect of taxes it would seem that, although the tax had become barred, Congress could have repealed the statute of limitation and thereby revived the right of the Government to collect. (Campbell v. Holt, supra.) May not Congress also, even though the liability for a tax as to which the statute has run has been extinguished, repeal the limitation statute and the statute extinguishing the liability for the tax and by appropriate legislation recreate the liability? It would seem that the only objection that could be raised to such action would be the power of Congress retroactively to recreate a liability for a tax that, beyond question, had once been lawfully imposed. (Cf. The City of Seattle v. Kelleher, 195 U. S. 351; United States v. Heinszen & Co., 206 U. S. 370; Billings v. United States, 232 U. S. 261; Rafferty v. Smith, Bell & Co., Ltd., 257 U. S. 226.) If Congress has authority retroactively to impose a tax and thereby create a debt for the tax to the sovereign in the first instance, has it not equal authority to reimpose and revive a tax that has been abrogated by a statute of limitation that relieved the taxpayer from liability? The case of Wm. Danzer & Co., Inc. v. Gulf & Ship Island R. R. Co., supra, was a suit for damages between private persons and the court held

that to construe section 206 (f) of the transportation act, suspending the statute of limitations during Federal control of railroads, retroactively, so as to create a liability that was barred at the time of its enactment, would be to deprive the railroad company of its property without due process of law in violation of the fifth amendment. That case is not necessarily authority for the proposition that the same rule would apply to the sovereign power of taxation.

25 V. *Judgment*

At a Court of Claims held in the city of Washington on the 2d day of June, A. D. 1930, judgment was ordered to be entered as follows:

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $45,197.74, with interest, as provided by law.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of forty-five thousand one hundred ninety-seven dollars and seventy-four cents ($45,197.74), with interest at the rate of six per cent per annum from August 17, 1926, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of May, 1928.

26 [Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 35338. Court of Claims. Term No. 416. The United States, petitioner, vs. Wyman, Partridge & Company. Petition for a writ of certiorari and exhibit thereto. Filed September 2, 1930. File No. 35338.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1930